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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

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OFFICE OF SECRETARY

In the Matter of  
THE TELEPHONE CONSUMER  
PROTECTION ACT OF 1991

CC Docket No. 92-90

Comments and  
Petition for Clarification and Action  
of Private Citizen, Inc.

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COMMENTS:

Private Citizen, Inc. considers the Telephone Consumer Protection Act of 1991 (TCPA), to be emblematic of what is wrong with our legislative process. Indeed, a December 1994 staff report of a U S House Subcommittee found "... the TCPA [has] proved ineffective at best and anti-consumer... at worst." With the help of the FCC "The telemarketing industry has managed to engineer a cure worse than the putative disease."

Rather than regulate tax-exempt entities, under TCPA they are excluded. Yet a tax-exempt entity's call will be as untimely and annoying as a sales solicitation. Also, such calls on behalf of municipal entities like police/fire associations, which are commonly an amalgam of unions assembled by a telemarketing firm to enable it to solicit, often induce donations via an unstated fear that if one donates, the fire/police department will react quicker than they otherwise would. This concern is greatest in senior citizens. At the same time, a small portion of donations actually made benefits the unions (at most 25%, commonly 10%), and often can be used for anything... like their Fourth of July beer fund.

Rather than regulate survey firms, the TCPA excluded them. Yet most calls from genuine survey-research firms will not reach a party with whom the firm has an interest in surveying. For example;

A 'random sample' dinnertime call intended to survey people who have flown internationally within the past 12 months, will find a survey candidate fitting that criteria approximately once for every ten calls answered 'live'. And even when such a subject is found, 30% of them will refuse to participate. Thus, 97% of such a survey calls will serve only to disturb a family.

Survey calls to residents to ask those who commute to work on a specific metropolitan train system at least one time per week, will bother well over 100 'live answering' families before a candidate which meets that criteria is found. Such a survey could be accomplished without home intrusion, had the survey firm elected to interview those waiting on the commuter train platform.

I experienced the above examples. A genuine survey firm, pursuing a random universe sample, will call residents without knowing anything about them except for their randomly generated number. To a surveyor, residents are truly just a number.

Another example, recently reported in the Wall Street Journal, told of a leading list compiling firm that called residents using an ice cream 'survey' as a ruse to get the ages of those residents. The calling list was California's voter registration roll, which is not for commercial use. The firm's president said this ruse was used because it was less threatening than being honest. In 1991, this same executive, in an effort to stave off government regulation of the direct marketing industry, assured a House subcommittee on postal operations that the industry is doing a fine job in policing itself, and "is aware of the need to be concerned for the individual's right of privacy".

Rather than a national 'Do Not Call' database, the FCC elected to require only a company specific database. Thus allowing consumers to be annoyed by hundreds of firms.

Rather than enabling a TCPA violation victim an action on a first violation, the TCPA effectively allows a telemarketer to violate that resident, once every 12 months, while it strips from that resident, the opportunity of litigating against that violator. Furthermore, since the vast majority of residents are too involved with their personal affairs at home to enjoy being telemarketed, it is clear that they will not invest the time or money required to litigate against the well funded and talented legal department of a telemarketing firm.

Rather than requiring only a person's phone number to be indexed on a 'company specific' do-not-call database, the TCPA requires both a person's name and phone number to be included on the database. This process gives rise to TCPA violations when names are misspelled in a caller's database, thereby subjecting telemarketers to possible liability under the law, and subjecting residents to repeat calls. Indeed, telemarketers dial numbers, not names. An example of this problem will be discussed below.

For these and a myriad of other reasons, the TCPA can often be more accurately termed the 'Telemarketing Caller's Protection Act'.

To illuminate the absurdity of the telemarketing industry's practice of 'out-bound' solicitation; I was tele-solicited twice last month by a telemarketing service agency, under contract with (who I believe is) an FCC regulated telecommunications firm, to ask about my 800 number service (my 800 service is with a another firm, MetroMedia, Inc.).

Each time I was called on my 800 line, and each time I refused the surveyors' use of my 800 line (for which I am charged) for their own business purposes. Although that telemarketing service agency refused to disclose their principal/sponsor, I later learned the identity of that principal, and that the service bureau used a 'predictive dialer' to place these calls. Furthermore, I had told that principal many times over the past six years, in writing and verbally, that neither they nor anyone working on their behalf was to solicit anything of me, or Private Citizen, Inc..

Also, some days prior to the subject calls, I received a number of calls on my 800 line which disconnected when I stopped my activities and answered the phone. Upon reviewing my phone bill which charged for these calls, I noted that these 'hang-up' calls came from the same area code, prefix, and initial digits (eg. ###/###-###\*\*) as the subject telemarketing service agency's.

Predictive dialers use an algorithm to calculate, in real time, the average length of each call, and the average number of dials needed to reach a live party. With these results, and other calculations based on time-of-day, number of staff at post, etc., the devices will predict when the next staffer will be available. The device, connected to multiple telephone lines, alters the rate of its dialing based on these calculations, but essentially dials continually, programmed to disconnect upon reaching busy signals, no-answers, and out-of-service numbers, and to transfer answered calls to a telesolicitor.

A key feature of a predictive dialer is its ability to immediately hang-up on people answering their phone when these machine-gun-like dialers hit more consumers than the telemarketing firm has staff available at that moment, to pitch to. This 'abandonment' rate is set by the user, rising to 30% or more in the credit collection industry, while commonly set at 8% for other types of solicitation programs. The higher the abandonment rate, the less time a telemarketer must wait to make the next pitch, but the more often a called party will be hung-up on due to the unavailability of a telemarketer as a result of the predictive dialer's abandonment (speed) setting.

In the July 1991 issue of Telemarketing Magazine, the Direct Marketing Services director of operations at AT&T American Transtech (a telemarketing division of AT&T) was reported to have said that an abandonment rate of three percent was considered responsible for the industry. In my situation with the above mentioned soliciting firm, the abandonment rate seems (empirically) to have been set at 50 percent. This can be understood from the solicitor's point of view in that they were not paying the long-distances charges on the calls, I was.

This sociopathic practice ensures that telemarketers will not wait long between presenting solicitations, and encourages telemarketers to truncate calls to those who seem unlikely to comply, because fresh 'tele-victims' are presented automatically, almost as soon as a pitch is ended. Thus, predictive dialers are used by phone solicitors (commercial, non-profit, and survey/research) to make more contacts in two ways; less waiting between calls, and shortening each call. The result is an increased call rate by a factor of two or three. The consequence to American families and businesspeople is that these televictims are scattering from their activities to answer the urgent ring of a friend, relative or customer, only to be hung-up on by a firm who's appreciation of our rights is secondary to their myopic view of economic business practices.

## REQUEST FOR CLARIFICATION:

The following is the pertinent area of the TCPA in need of clarification:

(a) Definitions- As used in this section-

(1) the term 'automatic telephone dialing system' means equipment which has the capacity-

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(b) Restrictions on the Use of Automated Telephone Equipment

(1) Prohibitions- It shall be unlawful for any person within the United States

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or pre-recorded voice-

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

Please clarify the text of subsection (a) (1) (A), inclusive.

The definition indicates that an 'automatic telephone dialing system' is equipment with a capacity "to [either] store or produce telephone numbers to be called". If that equipment is capable of producing numbers, that production shall be performed by equipment which has the capacity to generate random or sequential numbers.

This seems a reasonable interpretation of (a) (1) (A), in that the passive storage of telephone numbers is separate from, and not dependent upon the means by which the numbers to be called are generated. 'Telephone numbers to be called' are commonly stored on computer, which feeds them to an automatic dialer. Computers have the capacity to generate random or sequential numbers.

It is unclear what the phrase "to dial such numbers" [(a)(1)(B)] means. Are 'such numbers' those '*telephone numbers to be called*' which are *stored* by equipment which has the capacity "to dial such numbers"? Are 'such numbers' those *produced* 'using a random or sequential number generator'? Are 'such numbers' those stored by equipment which has the *capacity* to produce random or sequential numbers? See the text on the preceding two pages (highlighted) for a sense of my conundrum. I do not know if I have a cause of action.

The term 'equipment' [(a)(1)], has no singular or plural form. It can be one piece of 'equipment', or many pieces of 'equipment'. The term indicates all components necessary 'to dial such numbers' [(a)(1)(B)]. If a device that dials numbers cannot do so without a source of such numbers, and that source has the capacity to generate random or sequential numbers, then it is that "equipment [as a whole] which has the capacity- to dial such numbers", whether it is in the same housing, building, city, or state at which an electronic communications link is established. For example, a 'predictive dialer' gets its telephone numbers from a computer.

Telephone calls regulated by 47 USC 227 are transmitted to called parties in various ways. Though the dialer may be far from us, the dialer's ring is within our premises.

In light of the above, please clarify the meaning of the term 'equipment'. Is 'equipment' to be understood to mean each component used in a system that dials such numbers, where the loss of any one such component will render such dialing impossible? Or does 'equipment' mean a device contained within a single housing, or on a single circuit board, or in a single 'microchip, which dials stored or produced telephone numbers to be called'?

REQUEST FOR ACTION/ENFORCEMENT:

Mrs. Lois Hofbauer of Glenwood, Illinois, was solicited a number of times, on her home telephone number, for medical insurance offered by Humana, Inc. of Louisville, Kentucky. During the first solicitation Mrs. Hofbauer instructed Humana not to solicit again. Subsequently, upon repeated solicitations from Humana, Mrs. Hofbauer requested a written copy of Humana's do-not-call policy. Like most Americans, Mrs. Hofbauer cannot take time from work in order to pursue this matter further. A log of all 1994 calls regarding this, and other TCPA ~~violations~~ follows:

*MATTERS 7513*

To	Date	From	Abstract of conversation
Hofbauer	04/07	Humana/Latisha	Solicitation - Hofbauer asked to be put on their do-not-call list.
Hofbauer	04/12	Humana/Don Lesler	Solicitation - Hofbauer asked to be put on their do-not-call list.
Hofbauer	07/07	Humana/ ?	Solicitation - Hofbauer asked to be put on their do-not-call list. The caller said she just left a meeting where she asked about such do-not-call requests.
Hofbauer	09/27	Humana/Carol Jordan	Solicitation - Hofbauer asked to speak to a supervisor
		Humana/Becky Allen	Becky states that Humana will take Hofbauer's number off their call list.
Humana	10/07	Hofbauer/Bulmash	We spoke to 'Romona' who said the person we should talk to was not in. We then asked Romona for a written copy of their do-not-call policy.
Humana	10/12	Hofbauer/Bulmash	We spoke with a Stacy Wilson who claimed she had the do-not-call file, and that she was aware of the TCPA. She also said, Humana gives incentives to telemarketers who get sales, but does not give incentives to telemarketers who get do-not-call requests. An opportunity of settling Humana's TCPA violations out of court was made. She stated she would check with her legal department.
Hofbauer	10/19	Humana/Ms. Eldridge	Solicitation - Hofbauer asked to be put on their do-not-call list
Humana	10/19	Hofbauer/Bulmash	Humana referred us to their attorney, Victor Gonzalez. We then called him about Hofbauer's offer to settle Humana's violations out of court. Gonzales stated he knew nothing about the TCPA.
Hofbauer	11/08	Humana/Peggy Farber	Solicitation - Hofbauer asked to be put on their do-not-call list. Farber stated that Hofbauer would have to call customer service to make that request. Farber also stated: Hofbauer's name was spelled 'Holfbauer' in their files.

To this date, Humana has not sent a written copy of their do-not-call policy, although such must be made available upon request pursuant to the TCPA.

I, Lois M. Hofbauer having read this page, ~~does~~ hereby state that the description of my interaction with Humana, Inc., their staff, and Mr. Robert S. Bulmash, is true.

*Lois M. Hofbauer*  
 Lois M. Hofbauer  
 814 Palm Drive  
 Glenwood, Illinois 60425  
 708/755-1591

*12/14/94*  
 Date

*Received in mail 12/13/94*  
*Received + checked with 12/14/94*

I look forward to the FCC's response concerning these matters.

Respectfully submitted,

*Robert S. Bulmash*  
 Robert S. Bulmash, President  
 Private Citizen, Inc.  
 P.O. Box 233  
 Naperville, IL 60555  
 708/393-1555

*Corrected 11/08 line*  
*and last of I, Lois etc.*  
*Mailed Thurs 12/15/94*

JANUARY 5, 1995